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CONTEXT



CONTEXTE

May 10, 1999

(6:30 p.m. EDT)

No. 106

SUMMARY OF CANADA'S ARGUMENTS BEFORE THE INTERNATIONAL COURT OF JUSTICE (ICJ)

The Claim by the Federal Republic of Yugoslavia (FRY)

The FRY claims that Canada and nine other NATO member States have violated international legal obligations concerning the use of force, non-interference with the internal affairs of a State, and genocide.

Nature of the Proceeding

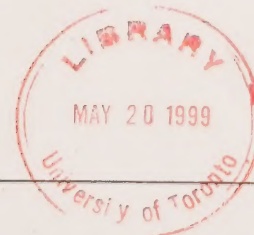
This is a preliminary hearing to determine whether provisional measures (interim relief) should be granted in order to preserve the respective rights of the Parties. The Court will not entertain submissions on the substantive merits of the case at this stage, although it will have to establish that it has *prima facie* jurisdiction to hear the matter.

The Question of Jurisdiction

The FRY's claim for jurisdiction is based on its declaration of April 25, 1999, accepting the compulsory jurisdiction of the Court for all disputes arising after that date, and on its status as a State Party to the *Genocide Convention*.

Canada is challenging the Court's jurisdiction on the following grounds:

- The UN has not recognized the FRY as the successor state to the former Yugoslavia; the FRY has never applied for membership in the UN. Only UN members are party to the Statute of the ICJ.
- The decision by NATO to conduct air operations is outside the time restriction on the FRY's own acceptance of jurisdiction, which was likely made to protect it against claims for its own past breaches of international law.



The Inappropriateness of Interim Relief

An order for provisional measures must take into account all the circumstances of the case. The circumstances all argue against granting the relief sought by the FRY:

- The FRY is not coming before the Court with "clean hands" and is seeking protection against the consequences of its own crimes against humanity. It has failed to comply with binding Security Council Resolutions demanding an end to the repression against Kosovar Albanians and their safe return.
- Ordering a cessation of NATO air operations would allow the FRY to complete its work of emptying Kosovo of its population.
- Such an order would have a devastating and permanent effect on the Kosovars and the region as a whole, which could not be remedied by a subsequent judgment on the merits.

Backgrounder

ICJ CASE OF THE LEGALITY OF THE USE OF FORCE: REQUEST FOR INDICATION OF PRELIMINARY MEASURES

On April 29, Canada received notice from the International Court of Justice (ICJ) that the Federal Republic of Yugoslavia (FRY) had submitted an application against Canada and nine other NATO members (the United States, the United Kingdom, France, Germany, Italy, the Netherlands, Belgium, Portugal and Spain) for provisional measures in respect of various alleged violations of international law. The ICJ has set these 10 matters down for hearing May 10-11, 1999.

What is the nature of the FRY action against Canada?

The FRY has brought separate applications against Canada, the United States, the United Kingdom, France, Germany, Italy, the Netherlands, Belgium, Portugal and Spain requesting a declaration that these States are responsible for violation of several international obligations, ranging from the obligation not to intervene in the affairs of another state, to allegations of genocide.

Canada unequivocally rejects the FRY's allegations. The FRY continues to commit serious violations of international law and this case will focus attention on these violations. We would also expect the FRY to demonstrate its respect for international law by co-operating with the International Criminal Tribunal for the Former Yugoslavia.

Why has this action been brought against Canada? Surely there are other NATO members that are more active than Canada in the FRY.

The FRY has chosen to bring separate proceedings against 10 of the 19 NATO member states. While we cannot speculate as to the FRY's reasons for choosing these 10 states, we understand that the broad, unsubstantiated allegations made against each respondent state are the same or similar.

Has the FRY made another application as well? What is being heard in the Hague this week?

The FRY has also requested that the Court make an order for provisional measures. It is the request for provisional or interim measures that will be considered by the Court this week.

What are provisional measures?

A State may make a request for provisional measures in situations where it claims that the actions of another State must be stopped on an emergency basis. The Court will hear such requests on a priority basis, and may decide to issue an order indicating how the parties should conduct themselves on an interim basis, prior to the Court hearing the full merits of the case.

In what other circumstances have provisional measures been requested?

Provisional measures have been requested in circumstances ranging from armed conflict to protection of economic interests. Most recently, Bosnia and Herzegovina requested provisional measures against Yugoslavia in the case of the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*.

What is an Agent?

An Agent is the lawyer who represents the government. Canada's Agent will argue the case of the Government of Canada at the ICJ.

Philippe Kirsch, Legal Adviser, who was Canada's agent before the ICJ in the *Fisheries Jurisdiction (Spain v. Canada)* case, has been chosen by the Government as Canada's Agent in this case.

What is a Judge *ad hoc*?

Any party that does not have a judge of its nationality on the ICJ may nominate a Judge *ad hoc*. Judges *ad hoc* participate on terms of complete equality with the other judges of the Court in the cases for which they are appointed. The Court may refuse to appoint the nominee if it determines that that party's interests would be adequately served by other judges on the Court.

Canada has nominated Marc Lalonde as Judge *ad hoc* in this case. He previously served as Judge *ad hoc* in the *Fisheries Jurisdiction* case. The FRY objected to the appointment of a Canadian Judge *ad hoc* on the basis that a number of respondent countries have nationals on the Court, and that Canada's interests would be adequately served by these judges. The Court has accepted Mr. Lalonde's nomination, despite the objections of the FRY.

The FRY has also nominated a Judge *ad hoc*, and this nomination has also been accepted by the Court.

Backgrounder

INTERNATIONAL COURT OF JUSTICE, THE HAGUE

The International Court of Justice (ICJ) was set up in 1945 under the Charter of the United Nations to be the principal judicial organ of the Organization.

The Court has a dual role :

1. To settle in accordance with international law the legal disputes submitted to it by States; and
2. To give advisory opinions on legal questions referred to it by duly authorized international organs and agencies.

The United Nations General Assembly and the United Nations Security Council (UNSC) elect fifteen judges to the ICJ, who serve nine-year terms of office. Elections are held every three years for one-third of the seats. Judges may be re-elected.

Currently, the Court is composed of judges from : Algeria, Brazil, China, France, Germany, Hungary, Japan, Madagascar, the Netherlands, the Russian Federation, Sierra Leone, Sri Lanka, United Kingdom, the United States and Venezuela. When the Court does not include a judge of the same nationality as a State party to a case, that State may nominate a person to sit as a judge *ad hoc* for the purpose of the case. However, the court may choose not to appoint a judge *ad hoc* if it is of the opinion that the interests of the party would be adequately represented by the existing members of the Court.

ICJ Procedure

ICJ proceedings include a written and an oral phase. It is also possible for a party to request provisional measures. Such requests are considered by the Court on a priority basis — usually within two to four weeks of the request. During the written phase, parties file and exchange pleadings, while the oral phase involves public hearings at which agents and counsel address the Court.

Court deliberation, *in camera*, follows the oral phase. Judgement is then delivered at a public sitting, and is considered final and without the recourse to appeal. However, if an involved State fails to comply with the judgement, the other party may bring the matter to the UNSC.

The Court has delivered 68 judgements since 1946, on disputes concerning, *inter alia*:

- land frontiers and maritime boundaries
- territorial sovereignty
- the non-use of force
- non-interference in the internal affairs of States
- diplomatic relations
- hostage taking
- the right of asylum
- nationality
- guardianship
- rights of passage
- economic rights

The States Members of the UN and two States non-Members (Nauru and Switzerland) are entitled to apply to and appear before the Court.

English and French are the two official languages of the ICJ.

BIOGRAPHICAL NOTES: PHILIPPE KIRSCH

Philippe Kirsch joined the Department of External Affairs in 1972 after receiving a Master of Laws degree from the Université de Montréal. Since then, Mr. Kirsch has served as Ambassador and Deputy Permanent Representative of Canada to the United Nations and as Ambassador and Agent for Canada to the International Court of Justice. He has been Legal Adviser for the Department of Foreign Affairs and International Trade since 1994.

Philippe Kirsch has extensive experience in multilateral legal forums. He was Ambassador and Agent for Canada before the International Court of Justice from 1995-98 in the *Fisheries Jurisdiction (Spain v. Canada)* case. In June 1998, Mr. Kirsch was elected Chairman of the Committee of the Whole for the Conference on the International Criminal Court (ICC); this Committee negotiated the final text for the ICC Statute.

Other assignments have included Chairmanship of the following Committees: the influential Sixth (Legal) Committee of the UN; the UN Ad Hoc Committee for the Elaboration of a Convention for the Suppression of Nuclear Terrorism; the UN Ad Hoc Committee on the Elaboration of a Convention for the Suppression of Terrorist Bombings; the Drafting Committee of the 26th International Conference of the Red Cross and the Red Crescent in 1995; the Working Group of the UN Special Committee on Peacekeeping; the UN Ad Hoc Committee on a Convention for the Safety of UN and Associated Personnel; and the Drafting Committee of the International Conference on the Protection of War Victims. Mr. Kirsch is also the author of numerous articles and papers on various subjects relating to international law and the United Nations.

BIOGRAPHICAL NOTES: MARC LALONDE, P.C., O.C., Q.C.

Marc Lalonde has extensive international law experience, including an appointment as an *Ad Hoc* judge of the International Court of Justice concerning a dispute between Spain and Canada (1995-1998), Special Envoy in a Canada-Brazil regional aircraft dispute (1998), member of the International Advisory Council to the Presidium of Ukraine (1990-1996); member of the Advisory Committee on Constitutional Matters in the former Czechoslovakia (1989-1991) and member of the International Advisory Council of Air France (1991-1996). He is currently the Director General of a major Policy Implementation Program, funded by the Government of Canada, advising the National Assembly and the Government of Vietnam.

Marc Lalonde holds a Master of Laws degree from the Université de Montréal, as well as a Master's degree from Oxford University and a Diplôme d'études supérieures en droit (D.E.S.D) from the University of Ottawa.

Marc Lalonde was first elected to the House of Commons in 1972, and appointed Minister of Health and Welfare. In the course of his political career, Mr. Lalonde has held the portfolios of Minister Responsible for the Status of Women (1974-1979), Minister of State Responsible for Federal-Provincial Relations (1977), Minister of Justice and Attorney General for Canada (1978), Minister of Energy, Mines and Resources (1980) and Minister of Finance (1982). Currently, Marc Lalonde is a partner at Stikeman, Elliott law firm, and practises corporate and commercial law with a practice involving international investment and international business transactions.



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